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Federal Communications Commission

DA 00-2340

2000 OCT 20 12 05
 FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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Adopted: October 13, 2000

Released: October 16, 2000

Ms. Cassandra Carr
 Senior Executive Vice President – External Affairs
 SBC Communications, Inc.
 175 E. Houston Street
 San Antonio, TX 78205

RE: *SBC/Ameritech Merger Order*, CC Docket No. 98-141, ASD File No. 99-49

Dear Ms. Carr:

This letter addresses issues related to the interpretation of SBC Communications, Inc. (SBC) regarding certain *Merger Conditions* adopted by the Commission in the *SBC/Ameritech Merger Order*.¹ Upon review of correspondence and other information, I have serious concerns regarding SBC's interpretation of the *Merger Conditions*.

One issue involves SBC's interpretation of the provision that allowed SBC's incumbent LECs to perform network planning, engineering, design, and assignment services on behalf of SBC's Advanced Services Affiliate only for a limited period of time. Paragraph 3(c)(3) of the *Separate Affiliate for Advanced Services* condition unequivocally states that, 180 days after the merger close date (*i.e.*, April 5, 2000), SBC's incumbent LECs may no longer perform network planning and engineering services for SBC's Advanced Services Affiliate.² There are no provisions in the *Merger Conditions* that override the express 180-day deadline,³ nor are there any exceptions for the provision of ADSL services. Therefore, SBC's

¹ Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Merger Order*").

² *SBC/Ameritech Merger Order* at Appendix C, para. 3(c)(3) (stating that "[a]fter 180 days, the separate affiliate shall not obtain [network planning and engineering] services from any SBC/Ameritech incumbent LEC."); *see also* Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Second Memorandum Opinion and Order*, FCC 00-336 at paras. 26, 59 (rel. Sept. 8, 2000) ("*SBC Plug & Play Order*").

³ SBC relies on the last sentence in paragraph 3(d) as granting SBC's incumbent LECs the authority to provide network planning, engineering, design, and assignment services for ADSL service beyond the 180-day deadline specified in the *Merger Conditions*. *See* Letter from Michael K. Kellogg, Outside Counsel for SBC Communications, Inc., to Carol E. Matthey, Deputy Bureau Chief, Common Carrier Bureau, FCC n.2 (Feb. 15, 2000) ("Kellogg Letter").

incumbent LECs were not permitted to provide any network planning and engineering services to their Advanced Services Affiliate after April 5, 2000.

I understand that it is SBC's view that Paragraph 3(d) of the *Separate Affiliate for Advanced Services* condition allows its incumbent LECs to provide to its Advanced Services Affiliate, on an exclusive basis, network planning and engineering services related to the provision of ADSL service after April 5, 2000. SBC apparently interprets the *Merger Conditions* to allow its incumbent LECs to perform such services for the separate affiliate until line sharing is provided to unaffiliated carriers within the same geographic region.⁴ This is an incorrect interpretation of Paragraph 3(d). The condition neither expressly permits that,⁵ nor would it be consistent with ordinary principles of textual construction to read one provision (*i.e.*, Paragraph 3(d)) in a fashion that nullifies another provision (*i.e.*, Paragraph 3(c)(3)). The provisions must be construed consistent with the underlying intent of the *Merger Conditions* to transition to full compliance with the separate affiliate condition as quickly as possible without disrupting service to the embedded base of customers. Accordingly, the grant of authority in Paragraph 3(d) regarding line sharing should be construed narrowly.

Another concern involves SBC's interpretation of the transitional mechanism contained in the *Separate Affiliate for Advanced Services* condition. Under the *Merger Conditions*, SBC had to provide advanced services under certain conditions that were the "functional equivalent" of provisioning through a fully operational separate affiliate for a certain period of time.⁶ SBC states, however, that the functional equivalent provisions are optional.⁷ SBC contends that it could choose between two transitional

⁴ See Kellogg Letter at n.2.

⁵ The last sentence in Paragraph 3(d) grants permission for SBC's incumbent LECs to provide interim line sharing arrangements to their separate affiliate until line sharing is made generally available to all parties. See *SBC/Ameritech Merger Order* at para. 369. To qualify for this grant of authority, SBC's incumbent LECs must make available to unaffiliated carriers the "Surrogate Line Sharing Discount," which is the economic equivalent of line sharing. Thus, while SBC's Advanced Services Affiliate may line share with SBC's incumbent LECs, unaffiliated carriers obtain a discounted unbundled local loop in order to provide ADSL or other advanced services to consumers. Nothing about the last sentence in Paragraph 3(d) overrides the very specific provisions in Paragraphs 3 through 6. Notably, network planning, engineering, design, and assignment services are not mentioned in this Paragraph.

⁶ See *SBC/Ameritech Merger Order* at Appendix C, para. 6(g). Under Paragraphs 4(n)(2), 5(a), and 6 of the *Merger Conditions*, SBC was required to offer interstate advanced services through its separate Advanced Services Affiliate no later than February 5, 2000. The February 5, 2000 deadline is calculated from Paragraphs 4(n)(2), 5(a), and 6 of the *Merger Conditions*. Pursuant to Paragraph 5(a), the *Merger Conditions* required SBC to file interconnection agreements between its incumbent LECs and its Advanced Services Affiliate no later than the Merger Close Date, *i.e.*, October 8, 1999, and to operate under that interconnection agreement within 90 days of such filing. Pursuant to Paragraph 6, the *Merger Conditions* require SBC's Advanced Services Affiliate to service all new activations no later than 30 days after approval of all necessary agreements. As a result of this calculation, the final deadline by which SBC's Advanced Services Affiliate must operate in accordance with the "Steady-State Provisioning" requirements for new activations was 120 days after Merger Close Date, which was February 5, 2000. See *SBC/Ameritech Merger Order* at Appendix C, paras. 5(a), 6(b); *see id.* at n.37-39.

⁷ Kellogg Letter at 2-8.

mechanisms -- the network planning and engineering provisions and the functional equivalent provisions -- during the phase-in period. SBC further construes the network planning and engineering provision as overriding the functional equivalent requirements and apparently empowering SBC's incumbent LECs to provide advanced services as they did before the merger during a transition period of unspecified duration.⁸

Again, SBC's interpretation is incorrect. To read the *Merger Conditions* in such a fashion would render meaningless the plain language of provisions in the *Merger Conditions* requiring SBC to provide advanced services in a manner that is the functional equivalent of operating through a separate affiliate.⁹ SBC's interpretation would allow its incumbent LECs to continue to provide advanced services well beyond the merger close date. By reading the functional equivalent provisions as optional,¹⁰ SBC's interpretation would significantly delay realization of the benefits of the separate affiliate condition.

Please do not hesitate to contact me if you wish to further discuss these issues. You may also contact Anthony Dale in the Common Carrier Bureau at (202) 418-2260 for further information on this matter.

Sincerely,

Carol E. Matthey
Deputy Chief, Common Carrier Bureau

CC:

Marian Dyer, SBC Telecommunications, Inc.

⁸ See Kellogg Letter at n.2, 7 (asserting that SBC's incumbent LECs "may take the order, design the service, assign the equipment, and create and maintain all the necessary records, using its own systems and databases.").

⁹ See *SBC/Ameritech Merger Order* at Appendix C, para. 6(g).

¹⁰ Kellogg Letter at 3, 5, 6.